No. 84-1400

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IN THE

Supreme Court of the United States

October Term, 1984

RAYMOND J. DONOVAN,

Petitioner,

against

MARIO MEROLA, District Attorney,
Bronx County, New York, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978

RESPONDENTS' BRIEF IN OPPOSITION

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Questions Presented

1. Whether the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978, had the statutory authority to order the disclosure of investigatory records, including grand jury materials, procured or generated during the investigation by Special Prosecutor Leon Silverman to the District Attorney of Bronx County, New York.

2. Whether the requirements of Fed.R.Crim.P. 6(e)(3)(C)(i), 6(e)(3)(D), were satisfied by application to the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978, pursuant to 28 U.S.C. §§ 592(d)(2), 595(b)(3).

TABLE OF CONTENTS

	PAGE
Questions Presented	1
Table of Authorities	iv
Statutes Involved	v
Statement of the Case	2
Argument	8
Point One—The United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978, had the statutory authority to order the disclosure of investigatory records, including grand jury materials, procured or generated during the investigation by Special Prosecutor Leon Silverman to the District Attorney of Bronx County, New York	8
Point Two—The requirements of Fed.R.Crim.P. 6(e)(3)(C)(i), 6(e)(3)(D), were satisfied by application to the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978, pursuant to 28 U.S.C. §§ 592(d)(2), 595(b)(3)	15
Conclusion	21

TABLE OF AUTHORITIES

PAGE

Cases:

Cobbledick v. United States, 309 U.S. 323 (1940) 17

Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979) 17, 18, 19, 20, 21

Illinois v. Abbott & Associates, Inc., 460 U.S. 557 (1983) 20, 21

In Re Disclosure of Evidence, 650 F.2d 599 (5th Cir. 1981) 17

In Re Grand Jury Matter, 682 F.2d 61 (3d Cir. 1982) 16–17

In Re Special Grand Jury (For Anchorage, Alaska), 674 F.2d 778 (9th Cir. 1982) 17

Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959) 21

United States v. Baggott, 463 U.S. 476 (1983) 16

United States v. Penrod, 609 F.2d 1092 (4th Cir. 1979) 17

United States v. Proctor & Gamble Co., 356 U.S. 677 (1958) 19

United States v. Sells Engineering, Inc., 463 U.S. 418 (1983) 20

Statutes:

28 U.S.C. § 49 ..... 8, 9

28 U.S.C. §§ 591-598 ..... 8, 10, 11, 12, 15, 16

Fed.R.Crim.P. 6(e)(3) 15, 16, 18

Other Authorities:

S.Rep. No. 95-170, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. and Adm. News 9, 10, 11, 12

S.Rep. No. 97-496, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. and Adm. News 10, 12

Statutes Involved

The Federal statutory provisions involved are:

28 U.S.C. § 592(d)(2):

> No application or any other documents, materials, or memorandums supplied to the division of the court under this chapter shall be revealed to any individual outside the division of the court or the Department of Justice without leave of the division of the court.

28 U.S.C. § 593(a):

> The division of the court to which this chapter refers is the division established under section 49 of this title.

28 U.S.C. §§ 594(a)(1), 594(a)(4):

> Notwithstanding any other provision of law, a independent counsel appointed under this chapter shall have, with respect to all matters in such independent counsel's prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18. Such investigative and prosecutorial functions and powers shall include—
>
> (1) conducting proceedings before grand juries and other investigations;
>
> (4) reviewing all documentary evidence available from any source;

28 U.S.C. §§ 595(b)(1), 595(b)(2), 595(b)(3):

> (1) In addition to any reports made under subsection (a) of this section, and before the termination

of a independent counsel's office under section 596(b) of this title, such independent counsel shall submit to the division of the court a report under this subsection.

(2) A report under this subsection shall set forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such independent counsel which was not prosecuted.

(3) The division of the court may release to the Congress, the public, or to any appropriate person, such portions of a report made under this subsection as the division deems appropriate. The division of the court shall make such orders as are appropriate to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution. The division of the court may make any portion of a report under this section available to any individual named in such report for the purposes of receiving within a time limit set by the division of the court any comments or factual information that such individual may submit. Such comments and factual information, in whole or in part, may in the discretion of such division be included as an appendix to such report.

28 U.S.C. §§ 49(a), 49(c), 49(d), 49(f):

(a) Beginning with the two-year period commencing on the date of the enactment of this section, three judges or justices shall be assigned for each successive two-year period to a division of the United States Court of Appeals for the District of Columbia to be the division of the court for the purpose of appointing independent counsels.

(c) In assigning judges or justices to sit on such division of the court, priority shall be given to senior circuit judges and retired justices.

(d) The Chief Justice of the United States shall designate and assign three circuit court judges or justices, one of whom shall be a judge of the United States Court of Appeals for the District of Columbia, to such division of the court. Not more than one judge or justice or senior or retired judge or justice may be named to such division from a particular court.

(f) Except as otherwise provided in chapter 39 of this title, no member of such division of the court who participated in a function conferred on the division under chapter 39 of this title involving a independent counsel shall be eligible to participate in any judicial proceeding concerning a matter which involves such independent counsel while such independent counsel is serving in that office or which involves the exercise of such independent counsel's official duties, regardless of whether such independent counsel is still serving in that office.

Rules 6(e)(3)(C)(i) and 6(e)(3)(D) of the Federal Rules of Criminal Procedure:

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Mario Merola, District Attorney, Bronx County, New York, et al., respectfully request that the Court deny the petition for a writ of certiorari, seeking review of the order of the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978, entered on December 5, 1984.

Statement of the Case

On December 29, 1981, the division of the United States Court of Appeals for the District of Columbia Circuit for the Purpose of Appointing Special Prosecutors appointed Leon Silverman, pursuant to the Ethics in Government Act of 1978, to investigate numerous allegations of violations of Federal law by Secretary of Labor Raymond J. Donovan. On June 25, 1982, Special Prosecutor Silverman filed a final report with the division of the court. The report consisted of a detailed account describing the work of the special prosecutor, the numerous allegations investigated, the contents of interviews of witnesses conducted by the Federal Bureau of Investigation in previous investigations, the contents of interviews of witnesses conducted by the Special Prosecutor's staff, the contents of documents obtained by the Special Prosecutor and the grand jury, and the contents of testimony before the grand jury. The report described the substance of the information gathered, and was supported by annotations to documents, exhibits, and grand jury minutes. On June 25, 1982, the division of the court released a redacted version of the report, consisting of approximately 1000 pages, to the public.

One of the numerous allegations investigated by Special Prosecutor Silverman involved illegal activities in the relationship between petitioner and his company, Schiavone Construction Company, and William P. Masselli, president of Jopel Contracting and Trucking Corporation, a subcontractor for Schiavone Construction Company and successor to Nargi Contracting and Trucking. In the June

25, 1982 report, the Special Prosecutor detailed the cooperation he had received from Nat Masselli, son of William P. Masselli, an incarcerated Federal prisoner. The elder Masselli had claimed that he had paid $20,000 cash as a kickback to Schiavone Construction Company officer Joseph DiCarolis in return for receiving a $200,000 interest-free loan from petitioner and DiCarolis in March 1979 to enable Masselli's company, Jopel, to finance the payroll and thereby appear to operate as a minority business enterprise subcontractor on a federally funded public works project. Masselli had also claimed that Jopel was entitled to 7½ percent of $8 million listed as "rental costs" of equipment from Schiavone Construction Company which in fact were never incurred but were attributed as payments by Schiavone Construction Company to Jopel, an alleged minority business enterprise subcontractor. The Special Prosecutor attempted to corroborate these claims by recording telephone conversations between Nat Masselli and Morris Levin, an officer of Schiavone Construction Company, during which the two discussed the kickback for the $200,000 loan, the disputed money owed to Jopel for the "rental costs," and how Masselli's father would testify before the grand jury about these matters. The details of Nat Masselli's cooperation were contained in the public version of the Special Prosecutor's report.

In July 1982, in response to new allegations of impropriety by petitioner and new evidence regarding some of the allegations already investigated, Special Prosecutor Silverman reopened his investigation. On the evening of August 25, 1982, the day before William P. Masselli was scheduled to testify before the grand jury, Nat Masselli was murdered in Bronx County, New York. Subsequent inves-

tigation by the District Attorney of Bronx County, New York, and the New York City Police Department revealed that one of the reasons Nat Masselli was murdered related to his father's scheduled appearance before the grand jury the next day and Nat Masselli's attempts to record conversations regarding the kickback for the $200,000 loan and the disputed money owed to Jopel. On September 10, 1982, Special Prosecutor Silverman filed a supplemental report with the division of the court, detailing his further investigation in the same manner as he had done in his first report. On the same date, the division of the court released a redacted version of the report to the public.

On November 12, 1982, the division of the court granted the request by the District Attorney of Bronx County, New York, with the consent of Special Prosecutor Silverman, for disclosure of particularly defined excerpts of the Special Prosecutor's unredacted reports, including investigatory records procured or generated during the investigation by the Special Prosecutor. The materials disclosed were limited to those records, referred to in the reports and in the custody of the division of the court, which related specifically to the subject of the Bronx, New York investigation, the murder of Nat Masselli, and particular individuals involved in that investigation. The materials disclosed were limited to particular documents, real evidence, and grand jury testimony. The order by the division of the court limited disclosure to particularly specified portions of the reports which related to specific subject-matters relevant to the Bronx, New York investigation, and included limited excerpts of grand jury testimony annotated in those portions of the reports. The division of the court ordered that the District Attorney make no disclosure of the contents of

these materials except to a grand jury in Bronx County, New York and other government personnel necessary to the investigation, presentation of evidence before a grand jury, and enforcement of the laws of the State of New York.

Subsequently, investigation by the District Attorney of Bronx County into the murder of Nat Masselli revealed that the September 22, 1978 unsolved murder of Salvatore Frascone in Bronx County, New York, was committed as a result of a dispute between William P. Masselli and Louis R. Nargi concerning control of a Schiavone Construction Company subcontract. Masselli's company, Jopel, had taken over Nargi's subcontract with Schiavone Construction Company, and a disagreement over the ownership of equipment, execution of the subcontract, and division of the profits, led to the murder of Frascone. The relationship between Schiavone Construction Company, Jopel Contracting and Trucking Corporation, and Nargi Contracting and Trucking, had been explored by the Special Prosecutor and had been detailed in the two reports filed with the division of the court. The District Attorney of Bronx County, New York, realizing that the matters detailed in the Special Prosecutor's reports related to the murder of Frascone and the motive for the murder, applied to the division of the court, with the consent of Special Prosecutor Silverman, for disclosure of particularly defined excerpts of the Special Prosecutor's unredacted reports, including investigatory records procured or generated during the investigation by the Special Prosecutor.

In orders of February 27, 1984, July 30, 1984, and August 17, 1984, the division of the court granted these requests, and disclosed materials which were limited to those

records, referred to in the reports and in the custody of the division of the court, which related specifically to the subject of the Bronx, New York investigation, the murder of Salvatore Frascone, and particular individuals involved in that investigation. The orders limited disclosure to particular documents, some of which had been obtained during previous state and Federal investigations, interviews of witnesses, some of which had been conducted during previous Federal investigations, and grand jury testimony. All materials disclosed by the division of the court were limited to particularly specified portions of the reports which related to specific subject-matters relevant to the Bronx, New York investigation, and included limited excerpts of grand jury testimony annotated in those portions of the reports. The division of the court ordered the same limitations on further disclosure as it had in its November 12, 1982 order, *i.e.*, that no disclosure of the contents of these materials be made except to a grand jury in Bronx County, New York and other government personnel necessary to investigate and present evidence before a grand jury and to enforce the laws of the State of New York. Pursuant to these orders by the division of the court, evidence contained in the materials was presented to the Grand Jury of Bronx County, New York.

In September 1984, the Office of the District Attorney of Bronx County, New York notified petitioner and the other parties listed in petitioner's brief, p. ii, that a grand jury investigation was under way and afforded them the opportunity to testify after waiving the transactional immunity automatically conferred by an appearance before a New York grand jury. Thereafter, petitioner and some of the other parties made applications to the division of the court

in the same manner as the District Attorney of Bronx County, New York had done. The division of the court disclosed to petitioner his entire grand jury testimony, relating to all of the numerous allegations investigated by the Special Prosecutor. In addition, the division of the court disclosed to petitioner interviews conducted by agents of the Special Prosecutor of at least one witness who testified before the Bronx County, New York grand jury.

On October 2, 1984, two indictments returned by the Grand Jury of Bronx County, New York were unsealed in New York Supreme Court, Bronx County. One indictment charged William P. Masselli and another with the murder of Salvatore Frascone. The other indictment charged petitioner, Masselli, eight other individuals, and two corporations with 137 counts of grand larceny, falsifying business records, and offering a false instrument for filing.

On November 19, 1984, the division of the court granted two applications: one by petitioner for disclosure of all motion papers filed by the District Attorney of Bronx County, New York and all orders of the division of the court concerning such motions; another by respondents for disclosure of all documents to all defendants in the Bronx, New York criminal cases (see Appendix).

On December 5, 1984, the division of the court denied petitioner's motion, without requesting a response from respondents, for an order (1) vacating the prior orders by the division of the court, which authorized disclosure of specified documents and materials to the District Attorney of Bronx County; and (2) requiring respondents to return the materials to the division of the court.

ARGUMENT

POINT ONE

The United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978, had the statutory authority to order the disclosure of investigatory records, including grand jury materials, procured or generated during the investigation by Special Prosecutor Leon Silverman to the District Attorney of Bronx County, New York [answering Petitioner's brief, Point I, pp. 9-10]

Petitioner claims that the division of the court had no jurisdiction over grand jury materials created by the Special Prosecutor during his investigation that were not included in the Special Prosecutor's report, and that the division of the court was without authority to order disclosure of such grand jury materials. Respondents submit that the statutes which established the division of the court and defined its powers and duties provided authority for the division of the court to order the disclosure of investigatory records, including grand jury materials, procured or generated by Special Prosecutor Leon Silverman to the District Attorney of Bronx County, New York.

The Ethics in Government Act of 1978 [28 U.S.C. §§ 591-598, ch. 39; Pub.L. 95-521, Title VI, §§ 601(a), 602 (a), Oct. 26, 1978, 92 Stat. 1867-1873, and amended Pub.L. 97-409, §§ 2-6, Jan. 3, 1983, 96 Stat. 2039-2042] created a division of the United States Court of Appeals for the District of Columbia Circuit and defined its specific duties and powers [28 U.S.C. §§ 593(a), 49]. In enacting these

provisions, Congress specified that a special court of three judges would be assigned to the division of the court and would assume the responsibilities set forth in the Act [28 U.S.C. §§ 49(a), (f)]. Moreover, Congress directed that priority in assigning judges to sit on such division of the court shall be given to senior circuit judges and retired justices, assigned by the Chief Justice of the United States, from three different courts [28 U.S.C. §§ 49(c), (d)]. The legislative history indicates that by giving priority to senior circuit judges and retired justices, the members of the special division would not be sitting on matters involving the Department of Justice on a day-to-day basis. Thus, the provision is a safeguard against the possibility of conflicts of interest on the part of the judges assigned. Moreover, as the special division would be dealing with very sensitive matters of great concern to the Administration and other elected officials, the assignment of retired judges would further reduce the possibility of conflicts of interest since, as retired judges, their ambitions would have been largely achieved. In addition, the assignment of judges from different courts is advantageous because the matters to be determined by the division are not of a local nature [see S.Rep. No. 95-170, 95th Cong., 2d Sess., pp. 36, 64, 77-78, 79, *reprinted in* 1978 U.S. Code Cong. and Adm. News, pp. 4252, 4280, 4293-4294, 4295]. Clearly, Congress intended that an independent division of the United States Court of Appeals for the District of Columbia Circuit, made up of judges from different courts who would be free from potential conflicts of interest, would have the exclusive responsibilities set forth in Chapter 39 of Title 28.

An independent counsel appointed by the division of the court has full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except as to matters concerning authorization for interception of wire or oral communications. Such investigative and prosecutorial functions and powers include conducting proceedings before grand juries and other investigations, and reviewing all documentary evidence available from any source [28 U.S.C. §§ 594(a)(1), (a)(4); see S.Rep. No. 95-170, *supra*, at 35, 66, *reprinted in* 1978 U.S. Code Cong. and Adm. News, *supra*, at 4251, 4282; see also S.Rep. No. 97-496, 97th Cong., 2d Sess., p. 2, *reprinted in* 1982 U.S. Code Cong. and Adm. News, p. 3538]. Before termination of his office, an independent counsel must submit to the division of the court a report, which must set forth fully and completely a description of the work of the independent counsel [28 U.S.C. §§ 595(b)(1), (b)(2)]. The legislative history indicates that the mandatory final report was considered by the Committee to be very important to ensure the accountability of a special prosecutor, in light of his enormous power and responsibility. The final report would provide a detailed document to permit the evaluation of the performance of a special prosecutor at an appropriate time. The report must set forth a full and complete description of the work of the special prosecutor, and must be in sufficient detail to allow a determination of whether the special prosecutor's investigation was thoroughly and fairly completed. The report would be a detailed and official record of the activities of the special prosecutor which may be reviewed

and analyzed at the appropriate time [see S.Rep. No. 95-170, *supra*, at 36, 70-71, *reprinted in* 1978 U.S. Code Cong. and Adm. News, *supra*, at 4252, 4286-4287].

The facts in the case at bar demonstrate that Special Prosecutor Leon Silverman submitted to the division of the court two final reports which detailed (1) the contents of documents obtained by the Special Prosecutor and the grand jury; (2) the substance of interviews of witnesses conducted by the Federal Bureau of Investigation in previous investigations; (3) the substance of interviews of witnesses conducted by the Special Prosecutor's staff; and (4) the substance of testimony before the grand jury. The reports not only described the contents of the information gathered, but supported the text with annotations to documents, exhibits, and grand jury minutes. All investigatory records, including grand jury materials, were supplied to the division of the court with the reports and remain in the exclusive custody and control of the division of the court.

Among the duties and powers of the division of the court, Congress declared that the division of the court may disclose investigatory records procured or generated under Chapter 39 of Title 28. Pursuant to Title 28, United States Code, section 592(d)(2), no application or any other documents, materials, or memorandums supplied to the division of the court under this chapter shall be revealed to any individual outside the division of the court or the Department of Justice without leave of the division of the court. According to the legislative history, this provision requiring confidentiality unless the court directs otherwise is crucial to the general scheme of this chapter.

The Committee felt that it was appropriate for such decisions as to what should and should not be made public to be made by the division of the court [see S.Rep. No. 95-170, *supra*, at 56, 57-58, 64, *reprinted in* 1978 U.S. Code Cong. and Adm. News, *supra*, at 4272, 4273-4274, 4280].

Pursuant to Title 28, United States Code, section 595 (b)(3), the division of the court may release to the Congress, the public, or to any appropriate person, such portions of a report made under this subsection as the division deems appropriate. The division of the court shall make such orders as are appropriate to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution. According to the legislative history, the handling of the report, its release and the opportunity for rebuttal are within the control and discretion of the court. The Committee felt that there may be situations where the release of the report or parts of the report would not prejudice the rights of any individual or prejudice any ongoing prosecution. In addition, the Committee strongly felt that detailed information about the activities of the office of special prosecutor should be recorded and preserved and made available to the public and the Congress when the court deems appropriate [see S.Rep. No. 95-170, *supra*, at 36, 71, *reprinted in* 1978 U.S. Code Cong. and Adm. News, *supra*, at 4252, 4287; see also S.Rep. No. 97-496, *supra*, at 3, *reprinted in* 1982 U.S. Code Cong. and Adm. News, *supra*, at 3539].

It is clear, therefore, that Congress intended that a special division of the court, appointed under circumstances assuring its independence and impartiality, would

have the exclusive responsibility to control the disclosure of investigatory records, including grand jury materials, submitted to the division of the court by a special prosecutor or independent counsel. In the case at bar, those investigatory records were procured or generated by Special Prosecutor Leon Silverman pursuant to his powers as defined by the Act, including the power to conduct grand jury proceedings and investigations, and to review all documentary evidence available from any source. All investigatory records, including documents obtained, interviews of witnesses and grand jury minutes, were submitted to the division of the court with the final reports by the Special Prosecutor, and remain in the exclusive custody and control of the division of the court. In fact, the reports summarize the contents of those interviews and testimony, and supply annotations to the documents and grand jury minutes. Congress specifically empowered the division of the court to disclose such investigatory records supplied to it under the Act, including applications, documents, materials, memorandums, and portions of the final report, to any appropriate person upon a proper application, as the division deems appropriate. Congress also empowered the division of the court to order disclosure under appropriate restrictions to protect the rights of individuals named in the final report.

In the case at bar, four proper applications by the District Attorney of Bronx County, New York, with the consent of Special Prosecutor Leon Silverman, were made to the division of the court. The division of the court ordered disclosure of particularly defined excerpts of the Special Prosecutor's unredacted reports, including in-

vestigatory records in the custody of the division of the court, and limited excerpts of grand jury testimony annotated in those portions of the reports. Disclosure was ordered under specific restrictions not to further disclose the materials except to a Bronx County, New York, grand jury and other necessary government personnel. Pursuant to these orders by the division of the court, evidence contained in the materials was presented to the Grand Jury of Bronx County, New York. When the Office of the District Attorney of Bronx County notified petitioner and the other parties listed in petitioner's brief, p. ii, that a grand jury investigation was in progress and afforded them the opportunity to testify after waiving the transactional immunity automatically conferred by an appearance before a New York grand jury, petitioner and some of the other parties made applications to the division of the court in the same manner as the District Attorney of Bronx County, New York, had done. Petitioner received his entire grand jury testimony as well as interviews of at least one witness who testified before the Bronx County, New York, grand jury. After the Grand Jury of Bronx County, New York, had returned an indictment against petitioner and others, a further application to the division of the court by petitioner for disclosure of all motion papers and orders was granted. In addition, an application to the division of the court by respondents for disclosure of all documents to all defendants in the criminal case was also granted (see Appendix).

It is plain that both respondents and petitioner requested the division of the court to exercise its powers under the Ethics in Government Act of 1978. It is also plain that the division of the court properly exercised its

statutory authority to order the disclosure of investigatory records, including grand jury materials, procured or generated during the investigation by Special Prosecutor Leon Silverman, to both the District Attorney of Bronx County, New York, and petitioner. This exercise of discretion by the division of the court does not present such an important question of Federal law which would justify the issuance of a writ of certiorari.

POINT TWO

The requirements of Fed.R.Crim.P. 6(e)(3)(C)(i), 6(e)(3)(D), were satisfied by application to the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978, pursuant to 28 U.S.C. §§ 592(d)(2), 595(b)(3) [answering Petitioner's brief, Point II, pp. 11-17].

Petitioner claims that the applications made by the District Attorney of Bronx County, New York to the division of the court violated the requirements of Fed.R.Crim.P. 6(e)(3)(C)(i), 6(e)(3)(D) because (1) the Bronx County, New York grand jury investigations were not judicial proceedings; (2) the applications were not filed in the district where the grand jury convened; (3) no written notice of each application was served on petitioner; (4) the District Attorney of Bronx County, New York did not seek a limited disclosure of grand jury materials but instead requested entire grand jury transcripts; and (5) the District Attorney of Bronx County, New York did not sufficiently show the necessity for disclosure of grand jury materials. Respondents submit that (1) the division of the court properly or-

dered disclosure of grand jury materials preliminarily to or in connection with a judicial proceeding; (2) the applications were properly made to the court under which the grand jury was empaneled and which had exclusive custody and control of the grand jury materials; (3) written notice of each application was served on Special Prosecutor Leon Silverman as attorney for the government, who consented to the applications, but not on petitioner, who was not a party to the Bronx County grand jury proceedings; (4) only limited and specifically relevant excerpts of grand jury materials were requested by the District Attorney of Bronx County, New York, and granted by the division of the court; and (5) the District Attorney of Bronx County, New York sufficiently showed the necessity for disclosure of the grand jury materials requested.

The applications to the division of the court pursuant to 28 U.S.C §§592(d)(2), 595(b)(3) were consistent with and satisfied the requirements of Fed.R.Crim.P. 6(e)(3)(C)(i), 6(e)(3)(D). Under Rule 6(e)(3)(C)(i), a court may direct disclosure of grand jury materials "preliminarily to or in connection with a judicial proceeding." The phrase "in connection with" refers to a judicial proceeding already pending, while the phrase "preliminarily to" refers to one not yet initiated. The Rule contemplates only uses related fairly directly to some identifiable litigation, pending or anticipated. The focus is on the actual use to be made of the material and whether the primary purpose of disclosure is to assist in the preparation or conduct of a judicial proceeding [*United States* v. *Baggott,* 463 U.S. 476, 77 L.Ed.2d 785, 790-791 (1983)]. A planned state investigation which may result in criminal prosecution in a state court is "preliminary to" a judicial proceeding [*In Re Grand Jury Mat-*

ter, 682 F.2d 61, 65 (3d Cir. 1982)]. Without doubt, the grand jury is a part of the judicial process, and a proceeding before a grand jury constitutes a judicial inquiry [*Cobbledick* v. *United States*, 309 U.S. 323, 327 (1940)]. Clearly, disclosure to a state grand jury is encompassed by the Rule [*In Re Disclosure of Evidence*, 650 F.2d 599, 601 (5th Cir. 1981)]. There is no question, therefore, that the orders by the division of the court directed disclosure of grand jury materials preliminarily to or in connection with a judicial proceeding, since disclosure was permitted for use in pending Bronx County, New York grand jury investigations into the murders of Nat Masselli and Salvatore Frascone.

Requests for disclosure of grand jury materials under the Rule should be directed to the court under whose auspices the grand jury was empaneled because that is the court which supervised the grand jury and the only court with control over the transcripts and records. Moreover, policies dictate that the grand jury's supervisory court participate in reviewing requests for disclosure, as it is in the best position to determine the continuing need for grand jury secrecy. In addition, the government attorneys who worked with the court and the grand jury are more likely to be informed about the grand jury proceedings than those elsewhere [*Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 225-226 (1979); *In Re Special Grand Jury (For Anchorage, Alaska)*, 674 F.2d 778, 782-784 (9th Cir. 1982); *United States* v. *Penrod*, 609 F.2d 1092, 1097 n.8 (4th Cir. 1979)]. In the case at bar, although the grand jury sat in the Eastern District of New York, it was empaneled by the division of the United States Court of Appeals for the District of Columbia Circuit for the Purpose of Appointing In-

dependent Counsel pursuant to the Ethics in Government Act of 1978. The division of the court, specially created to appoint independent counsel and carry out the powers and duties authorized by the Act, had particular responsibilities related to the work of the grand jury and had direct and sole custody and control of the grand jury transcripts, documents, exhibits, and other materials. Since the division of the court was in the best position to review requests for disclosure, applications for disclosure were properly directed to that court.

Written notice of each of the applications by the District Attorney of Bronx County, New York was served in accordance with Rule 6(e)(3)(D). The attorney for the government who worked with the court and the grand jury, and who was fully familiar with the grand jury proceedings, was Special Prosecutor Silverman. Upon notification, the Special Prosecutor consented to the applications. Petitioner was not a party to the judicial proceeding since the Bronx County, New York grand jury investigation was an *ex parte*, secret proceeding and consequently, service of notice on petitioner was not required by the Rule. At the pre-indictment stage of an ongoing grand jury investigation, an adversary hearing is not mandated.

Under Rule 6(e), parties seeking grand jury transcripts must show that the material is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material needed [*Douglas Oil Co.* v. *Petrol Stops Northwest, supra,* at 222]. This Court has also stated that a limited dis-

closure may be ordered upon a showing of a compelling necessity and a particularized need [*United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 682, 683 (1958)]. In the case at bar, the particularized need was shown by (1) the obvious close nexus between the grand jury investigation by the Special Prosecutor and the murder of Nat Masselli; and (2) the inter-relationship between some subjects of the Special Prosecutor's investigation, namely Schiavone Construction Company, Jopel Contracting and Trucking Corporation and Nargi Contracting and Trucking, and the motive for the murder of Salvator Frascone. The division of the court and the Special Prosecutor, fully familiar with the work of the grand jury, was apprised of these inter-relationships and the apparent need for the materials. Similarily, the division of the court was aware of the compelling necessity for these materials in view of the absence of any other source and the inability to utilize compulsory process, since a compelled appearance before a New York grand jury automatically confers transactional immunity on a subpoenaed witness. Thus, these factors supported disclosure to avoid a possible injustice.

It is clear that the *Douglas Oil* standard is a highly flexible one, adaptable to different circumstances and sensitive to the fact that the requirements of secrecy are greater in some situations than in others. The standard accommodates any relevant considerations, such as the fact that disclosure to government movants poses less risk of further leakage or improper use than disclosure to private parties or the general public. Nothing in *Douglas Oil* requires the court to pretend that there are no differences between governmental bodies and private parties. The court may weigh the public interest served by dis-

closure to a governmental body [*United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 77 L.Ed.2d 743, 766 (1983); *Illinois* v. *Abbott & Associates, Inc.*, 460 U.S. 557, 567 n.15 (1983)]. Thus, disclosure is appropriate where the need for the materials outweighs the public interest in secrecy. As the considerations justifying secrecy become less relevant, the propriety of disclosure is less burdensome to demonstrate. Moreover, the court may include protective limitations on the use of disclosed materials [*Douglas Oil Co.* v. *Petrol Stops Northwest, supra*, at 223]. In the case at bar, the need for disclosure was clearly greater than the need for continued secrecy. The grand jury had completed its investigation, and its findings, contained in the Special Prosecutor's reports, had been released to the public by the division of the court. The public versions of the reports had detailed the substance of the grand jury materials sought, and the division of the court, in disclosing the materials to the District Attorney of Bronx County, New York, strictly limited further disclosure to a Bronx County, New York grand jury and necessary government personnel. The public interest served by disclosure to the District Attorney of Bronx County, New York, was surely considered by the division of the court.

The applications for disclosure were specifically structured to cover only the materials needed. The requests involved only specifically enumerated subject-matters and individuals, and the orders by the division of the court limited disclosure to specific documents, interviews and testimony summarized and annotated in the Special Prosecutor's reports. Disclosure included only limited excerpts of grand jury testimony, not the wholesale disclosure of

all grand jury materials, including reams of documents and hours of testimony previously found to be improper by this Court [see *Illinois* v. *Abbott Associates, Inc., supra,* at 564 n.8, 567 n.15].

The division of the court, infused with substantial discretion to determine whether to disclose grand jury materials [*Douglas Oil Co.* v. *Petrol Stops Northwest, supra,* at 223; *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 399 (1959)], exercised its discretion on behalf of respondents as well as petitioner, who made applications to the division of the court in the same manner as respondents had done. The issuance of a writ of certiorari to review this exercise of discretion is not warranted because an important question of Federal law has not been presented.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Mario Merola
District Attorney
Bronx County
Attorney for Respondents

Stephen R. Bookin
Assistant District Attorney
Of Counsel

April 1985

APPENDIX

Appendix

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of Appointing Independent Counsel Ethics in Government Act of 1978

In Re: Secretary of Labor Raymond J. Donovan — September Term 1984 No. 81-2

BEFORE: Robb, Senior Circuit Judge, Presiding, Morgan, Senior Circuit Judge, and Mansfield*, Senior Circuit Judge

ORDER

Upon consideration of the motion of Raymond J. Donovan for disclosure of all moving papers filed by the Bronx County (New York) District Attorney and all orders of the court granting or denying such motions, and upon consideration of the motion of Stephen R. Bookin, Esquire, on behalf of the District Attorney of Bronx County, New York, for disclosure of documents to all defendants indicted with Secretary Donovan in Indictment No. 1371-84, it is

ORDERED, by the Court, that the motion of Raymond J. Donovan is granted and that Leon Silverman, the former Special Prosecutor, is authorized to furnish to Raymond J. Donovan copies of all moving papers filed by the Bronx County District Attorney's office in support of its applications for access to the files and records of Special Prosecutor Leon Silverman and of the orders of this Division entered upon such applications. And it is

* Senior Circuit Judge Mansfield did not participate in the foregoing order.

FURTHER ORDERED, by the Court, that the motion filed on behalf of the District Attorney of Bronx County is also granted and the said District Attorney is hereby authorized to make available to all defendants indicted with Secretary Donovan in Indictment No. 1371-84 copies of all investigatory records procured or generated during the investigation of Special Prosecutor Leon Silverman which were previously disclosed to the District Attorney of Bronx County, New York. And it is

FURTHER ORDERED, by the Court, that the foregoing motions are granted upon the following conditions:

1. The defendants and counsel may not make additional copies of these materials or portions thereof without the prior express permission of this Court.
2. The defendants and counsel shall only disclose information contained in the materials when giving testimony under oath or affirmation at the trial or hearing of this action.
3. Immediately upon the termination of all proceedings, counsel for the defendants shall deliver the copies of the materials, together with any additional copies made by them pursuant to court order, to this Court for the purpose of being sealed and preserved with the records of this case.

Per Curiam

For the Court:

s/ GEORGE A. FISHER

GEORGE A. FISHER, Clerk

DATED: Washington, D.C.
November 19, 1984